PUBLIC PROSECUTOR

v.

LEONG CHOON YAN & ORS.

HIGH COURT MALAYA, KUANTAN
V.C. GEORGE J
[CRIMINAL TRIAL NO. 21 OF 1977]
23 SEPTEMBER 1981

CRIMINAL PROCEDURE: *Murder - Common intention - Right of private defence - Sections 96, 97, 100 Penal Code - Cautioned Statement - Whether it forms part of evidence for prosecution.*

CRIMINAL PROCEDURE: *Trial Jurisdiction of Magistrate - No case against accused - Section 173(f) Criminal Procedure Code - Whether prima facie case has to be made against accused before calling defence - Section 214(i)(ii) Criminal Procedure Code - Mallal's Criminal Procedure 4th Edn. - Whether submission of no case at close of prosecution should be Judge alone - Judge sitting alone - Section 180 CPC.*

EVIDENCE: *Prima Facie evidence - Whether made out - Defence counsel's submission of no case - Jury trail ss. 214 (i) and (ii) Criminal procedure Code - Judge alone to decide whether accused has to enter his defence.*

In this trial by jury case the learned judge had to consider the submission of no case to answer, after the prosecution's case, by counsel for the defence.

There was a fight involving a number of Chinese youths outside the Grand Cinema theatre at Mentakab just after the afternoon matinee. One of the youths died as a result of the fight.

The brother of the deceased one Tan Yoke Sin gave evidence at the Preliminary Enquiry that he, the deceased, and others were chased by 5 Chinese males who assaulted the deceased on the head and body with pieces of wood, he further stated that the 1st accused was one of the 5 who assaulted the deceased. Tan Yoke Sin did not give evidence at the trial as he could not be traced before the trial commenced.

The 4 accused made statements by way of confession. All the statements of the accused persons contend that they had after the matinee show put on their crash helmets and had got on or were about to get on their motor cycles when they were attacked by a number of Chinese youths armed with bottles and sticks. Some of the accused then armed themselves with bottles and pieces of wood and fought back. The 3rd accused stated that when the 4 accused persons were attacked 3 residents from Mentakab town came to their aid and helped the accused persons to fight off their assailants.

The 4th accused admitted to striking the deceased twice then ran away.

The 2nd and 3rd accused stated they saw the 4th accused hit the deceased once.

The 3rd accused also admitted to hitting the accused twice once on the head and once on the shoulder.

The deceased suffered a number of injuries on his head which according to medical evidence were a result of at least 4 blows. Only 2 of those 4 blows could have killed the accused.

The learned Judge had to decide, *inter alia*, on the truth of the 2 distinct versions of the prosecution's case and the right of private defence..

Held:

[1] The only evidence of common intention on the part of the accused persons, that was available, was the evidence of Tan Yoke Sin as gathered from his deposition. None of the other members of the deceased's group of friends were called by the prosecution.

[2] It is safe to assume a common intention if a group of friends all armed with pieces of wood and bottles suddenly chase and set upon another group. However, the prosecution had not rested their case on the deposition of the deceased's brother Tan Yoke Sin whose deposition given at the Preliminary Enquiry was admitted as evidence as he was not traced when the trial commenced. The prosecution had put in the statements of the accused person as part of the prosecution case and the weight of the aggregate of those statements not only completely neutralised the suggestion of common intention on the part of the accused persons but proved that the deceased and his group were the assailants and with the common intention of attacking the accused persons with pieces of wood and bottles to be used as clubs.

[3] On considering the two distinct versions of the prosecution's case, the Court was of the view that there was more than a right of truth in the statements of the accused persons particularly those where the makers had not shirked from confessing to have actually dealt blows to the head of the deceased with wooden clubs and who had surrendered themselves and had presumably without coercion volunteered to make statements to the Magistrate and to the investigating officer.

[4] With the rejection of the version of Tan Yoke Sin the Court found no evidence, of common intention on the part of the accused persons to attack the deceased or anybody else. In the absence of common intention the Court had to and looked for proof that a particular blow or blows had killed the deceased and for evidence to establish who had in fact struck the fatal blow or blows.

(b) In the Court's view either the 3rd or 4th accused could have killed the deceased but there was insufficient proof to establish that it was blow struck by one or the other of them that had killed the deceased. And in the absence of common intention the benefit of the doubt was given to both of them.

[5] In any event, the Court had also to consider the right of private defence which, it was open to the Court to consider if it arises from the material on record even if the accused did not plead self defence. In the face of the Court's finding of fact that the deceased and his party of five men armed with wooden clubs and bottles had set upon the four accused persons, the Court had no difficulty in concluding that the accused persons were justified in defending themselves with similar weapons and that although the unfortunate deceased suffered injuries that caused his death none of the accused persons had exceeded the right of private defence.

[6] In considering the evidence adduced by the prosecution which the Court assumed was the best evidence available it seemed obvious that the acquittal of each of accused persons at the close of the prosecution's case was inevitable and a foregone conclusion. In the event, the Court held to prove a *prima facie* case against any of the accused persons in respect of charge or in respect of any other offence and accordingly as required by s. 214(1) of the Code, the Jury was directed to return a verdict of not guilty.

[Acquitted and discharged.]

Cases referred to:
R. v. Power [1919] 1 KB 572
R. v. Abbot [1955] 2 All ER 899
Public Prosecutor v. Sihabduin & Anor. [1980] 2 MLJ 273

Legislation referred to:
Criminal Procedure Code, ss. 173(f), 180, 214(i), (ii)
Penal Code, ss. 96, 97, 100

For the prosecution - Ahmad Zaki bin Haji Husin, DPP Pahang
For the defence - Balwant Singh

JUDGMENT

V.C. George J:

In this Jury trial a submission of no case was made by the learned Counsel for the defence at the close of the case for the prosecution which submission and the reply thereto by the learned Deputy Public Prosecutor, I heard in the absence of the jury.

In a summary trial by a Magistrate, by s. 173(f) of the Criminal Procedure Code, if the Court finds at the close of the case for the prosecution that no case against the accused has been made out which if unrebutted would warrant his conviction, the Court shall record an order of acquittal. Section 180 makes a similar provision in a trial before the High Court with the Judge sitting alone. A *prima facie* case has to be made out before the accused can be called upon to enter on his defence.

Where the Judge sits with a jury, s. 214 has reference and which reads as follows:

> 214 (i) When the case for the prosecution is concluded the Court, if it considers that there is no evidence that the accused committed the offence, shall direct the jury to return a verdict of not guilty.
>
> (ii) If the Court considers that there is evidence that the accused committed the offence the Court shall call on the accused to enter on his defence.

In my view the import of s. 214(i) and (ii) is that in a Jury trial too, a *prima facie* case has to be made out against the accused at the close of the case of prosecution before the accused could be called upon his defence. I respectfully share the view of the author of Mallal's *Criminal Procedure* 4th Edn., where at p. 309 he concludes,

> It appears therefore that there is no difference between the local law and the English law on the subject and with the obligation - statutory or otherwise - of the Court in the first instance to acquit the accused person if at the end of the case for the prosecution no *prima facie* case is made out is the same here as under the English law.

At one stage it would appear that some quarters took the view that *R. v. Power* [1919] 1 KB 572 had decided that the English law was otherwise. But *R. v. Abbot* [1955] 2 All ER 899 made the position clear, Lord Goddard CJ in giving the judgment of the Court of Appeal said at page 901 -

> *R. v. Power* did not decide that if there was no evidence against a man who was indicted along with another person it was right to allow the case to go to the jury against that man or that if there was no evidence against that man, or that, if there was no evidence against him, to allow the case to go to the jury was other than a wrong decision in law.

(*Soo Seng v. PP* [1951] MLJ 143 pronounced that *Power's* case was not applicable in this country. But that was on another point).

Section 214(i) must be read with s. 214(ii) to bring the point home. The cardinal principle is that an accused may not be called upon to make his defence until such a case has been made out against him which if unrebutted would entitle the Court to convict him. See *Public Prosecutor v. Sihabduin & Anor.* [1980] 2 MLJ 273 at 275E left.

In a Jury trial a submission of no case at the close of the prosecution's case is made to the Judge alone (*R v. Koh Soon Poh* [1935] MLJ 120 at 122) the judgment in which case was referred to with approval by the Court of Appeal in *Idris v. Public Prosecutor* [1960] MLJ 296 at 297. At the close of the prosecution's case the judge is obliged to form an opinion as to whether the accused has to enter upon his defence and it is only if he is of the view that a *prima facie* case has been made out should he allow the case to go to the jury (*R v. Abbot, supra*).

Accordingly for the purposes of considering the submission of no case I had to be the judge of the facts as well as the law.

On 26 February 1977 there was a fight involving a number of Chinese youth outside the Grand Cinema theatre at Mentakab just after the afternoon matinee. The fight apparently was over in minutes but one of the youths, Tan Tuan Sui, died on the spot as a result of injuries sustained by him in the fight.

Medical evidence was that the deceased took a number of blows to the head and suffered a number of injuries two of which caused his death. The two fatal injuries could have been caused by "a heavy iron rod or a heavy wooden stick with sharp edges."

One witness for the prosecution was to have been a younger brother of the deceased named Tan Yoke Sin who had given evidence at the Preliminary Enquiry but whose whereabouts had not been traced when the trial commenced. In the event the contents of the deposition made by him at the Preliminary Enquiry were admitted as evidence as Exhibit P31. According to Tan Yoke Sin, he, his two brothers (one of whom was the deceased) and three friends of theirs were going towards their motor cycles after the afternoon matinee when they were chased by 5 male Chinese who assaulted the deceased on the head and body with pieces of wood apparently used as clubs. Tan Yoke sin was not assaulted because he ran away.

Tan Yoke Sin further deposed that the 1st accused Leong Choon Yan was one of the 5 who assaulted the deceased. He does not say what form the assault by the 1st accused took. He then went on to exculpate the other 3 accused persons by deposing that they were not among the 5 who had chased and assaulted the deceased. He was not prepared to say that the 3 other accused persons were even present at the scene of the incident.

On 5 March 1977, a few days after the deceased met his death, the elders of the Kerayong New Village where all the accused resided, persuaded them to surrender to the police. PW9 Chong Chit Lee took the four young men to the house of the OCPD and they were arrested.

On 7 March 1977, the 4th accused So Ah Chai made a statement by way of a confession to the Magistrate (Exhibit P1). On the following morning the 2nd accused Soh Seng Hock also made such a statement (P2) to the Magistrate. That same afternoon he also made a cautioned statement (P9) to ASP Megat Mohamed Iesha. On 9 March 1977 the 3rd accused, Yow Kim Kiew, made a cautioned statement (P25) to ASP Lee Suan Fatt. The prosecution relied on these statements as well as the deposition of Tan Yoke Sin (referred to hereinbefore) in attempting to bring home the charge to the accused persons.

The 4th accused, So Ah Chai, in his confession stated that he and the other 3 accused were coming out of the cinema theatre when they were set upon by a group of 4 or 5 persons which included the deceased. The deceased struck the 4th accused on the head with "a fairly long stick". The 4th accused then used the same stick to hit the deceased hard twice on the head after which he ran away. His friends also ran away.

In the statement made to the Magistrate on the morning of 8 March 1977 the 2nd accused, Soh Seng Hock said that when he and the other 3 accused were about to leave for home they were set upon by 4 or 5 persons armed with bottles and sticks. He ran away. He did not know who had hit the deceased. However in the afternoon of 8 March, in his statement to ASP Megat Mohamed Iesha, he said that as he ran away he saw the 4th accused, Soh Ah Chai, hit a Chinese once with a 2 feet long stick on the head and he saw that Chinese fall. The 2nd accused did not identify that Chinese as being the deceased.

The statement of the 3rd accused, Yow Kim Kiew, to ASP Lee Suan Fatt was also to the effect that as the 4 accused persons were at their motor cycles they were set upon by a group of male Chinese armed with bottles and sticks. He and his friends thereupon armed themselves with bottles and pieces of wood that were lying around and fought back. He saw the deceased throw a piece of wood at the head of the 4th accused, Soh Ah Chai and he saw the 4th accused hit the deceased on the head once with a piece of wood. The 3rd accused admitted that he had himself hit the deceased twice, once on his shoulder and once on his head. So Seng Hock and Leong Choon Yan (2nd and 1st accused respectively) threw bottles at the deceased. The 3rd accused did not see the deceased collapse. He and his friends "escaped" on their motor cycles.

The 3rd accused also stated that when he and his friends were attacked 3 other persons who were residents of Mentakab came to their aid and participated in the fight.

It is significant that in the Police report (P5) lodged by Tan Poh Sin, another brother of the deceased (not called but offered to the defence), and who had claimed that he was with the deceased when the fight broke out, he states that he and members of his party were attacked by 7 persons - which lends credence to the 3rd accused's statement that 3 residents of Mentakab had come to the aid of the 4 accused persons when the fight broke out. This fact was recognised by the prosecution as demanded by the learned Deputy Public Prosecutor amending the charge by the addition of the words "with 3 others still at large."

About the only evidence of common intention on the part of the accused persons, that was available, was the evidence of Tan Yoke Sin as gathered from his deposition. None of the other members of the deceased's group of friends were called by the Prosecution.

It is safe to assume a common intention if a group of friends all armed with pieces of wood and bottles suddenly chase and set upon another group. However, the prosecution had not rested their case on the deposition of Tan Yoke Sin. As has been seen, they had put in those statements of the accused persons as part of the prosecution case. The weight of the aggregate of those statements not only completely neutralised the suggestion of common intention on the part of the accused persons but proved that the deceased and his group were the assailants and with the common intention of attacking the accused persons with pieces of wood and bottles to be used as clubs.

In *Lim Yow Choon v. PP* [1972] 1 MLJ 205 the Federal Court held that notwithstanding that the cautioned statement was part of the evidence for the prosecution and that there are facts in the cautioned statement which appear to contradict other parts of the evidence led by the

prosecution, it was open to the trial Court as a judge of facts to assess the evidence and in so doing accept part of it and reject the rest. However, it seems to me that if the prosecution's case consists of two distinct versions of what has taken place without anything significant to suggest that one or the other of the versions is more probable, then the version more favourable to the accused should be accepted.

In the instant case in all the statements of the accused persons produced as part of the prosecution case is the contention that the accused persons had put on their crash helmets and had got on or were about to get on their motor cycles when they were attacked. I think Tan Yoke Sin gave the game away when he stated that the 1st accused was wearing a crash helmet when he assaulted the deceased and that before the assault took place the 1st accused was seated on a motor cycle.

Being confronted with two distinct versions of what had taken place I had to weigh on the one hand the deposition of the absent witness Tan Yoke Sin who as a brother of the deceased and a member of the deceased's party when the incident took place was clearly a witness with a purpose to serve (*See R v. Prater* [1960] 1 AER 298) against the statements of the accused persons who had surrendered themselves and had presumably without coercion volunteered to make statements to the Magistrate and to the investigating officer. It seemed to me that there was more than a ring of truth in those statements particularly those where the makers had not shirked from confessing to having actually dealt blows to the head of the deceased with wooden clubs.

As to Tan Yoke Sin, he was emphatic that only the 1st of the 4 accused persons were involved in the assault whereas the accused persons themselves admitted to having been involved, two of them admitting to actually striking the deceased. Tan Yoke Sin had deposed that he was not assaulted as he had run away. It seems to me that that is exactly what he had done when he found that the accused persons stood up to the attack and defended themselves and were assisted by the other 3 persons still at large. I found no difficulty in rejecting the version of what had taken place as set out in the deposition of Tan Yoke Sin even without applying the principle that the version more favourable to the accused should be accepted.

What then was left as the case for the prosecution was that the four accused persons were about to leave for home after the afternoon matinee when the deceased and his group with the common intention to do so attacked the four accused persons. The accused persons managed to run away, some of them having had to fight back before making good their escape. The accused persons were attacked with pieces of wood and bottles used as clubs and those of the accused that fought back also used pieces of wood and bottles that they had picked up from the ground as they were being attacked. Only one or two blows were struck by such of the accused persons that fought off their assailants. A passage from the evidence of the Magistrate Encik Victor Isaacs *vis-a-vis* the 4th accused So Ah Chai was as follows:

> Yes this youth did tell me that the deceased had assaulted him with a stick. That it was a big stick and the deceased had hit him with it on the head. Then he picked up the stick and hit the deceased with it and then he ran away. He also told me that he had surrendered himself to the Police.
>
> He also told me that he did not know where the blow landed. He was concerned with escaping. He did say that he did not know who the deceased was.

When the accused persons were attacked three residents of Mentakab town came to their aid and helped the accused persons to fight off their assailants.

With the rejection of the version of Tan Yoke Sin, I am constrained to and find no evidence of common intention on the part of the accused persons to attack the deceased or anybody else.

In the absence of common intention I had to and looked for proof that a particular blow or blows had killed the deceased and for evidence to establish who had in fact struck the fatal blow or blows.

The deceased suffered a number of injuries - at least six and perhaps eight, on his head which according to medical evidence were a result of at least four blows. Only two of those four blows could have killed the deceased.

The 4th accused, So Ah Chai, struck the deceased two blows with "a fairly big stick" with which the deceased had struck him. What he said in his confession (P1) was:

> The deceased assaulted me a stick. It was a fairly big stick. I was hit on the head. Then I picked up the stick which the deceased had used on me. Then I hit the deceased on the head twice and ran away.

Further down in his confession So Ah Chai went on to say,

> I do not know why the deceased assaulted me. I hit the deceased hard on the head. I do not know where the blow landed. I was more concerned with escaping.

So Seng Hock, the 2nd accused, told ASP Megat Mohamed Iesha that he had seen So Ah Chai hit a Chinese with a 2 feet long stick once and he had seen that Chinese fall. The 3rd accused, Yow Kim Kiew, had also seen the 4th accused, So Ah Chai hit the deceased once on the head.

The question then was whether either or both of the blows struck by So Ah Chai connect with the head of the deceased and whether one or both these blows were the ones that caused one or both those blows were the ones that caused one or both the fatal injuries.

The same question has to be asked in respect of the 3rd accused, Yow Kim Kiew, who had admitted to ASP Lee Suan Fatt that he had hit the deceased twice with a piece of wood, once on the head and once on the shoulder.

In my view, either So Ah Chai or Yow Kim Kiew could have killed the deceased but there was insufficient proof to establish that it was the blow struck by one or the other of them that had killed the deceased. And in the absence of common intention the benefit of the doubt should go to both of them as was shown succinctly in the judgment of Lord Goddard CJ in *Abbot's* case at p. 901E of the report,

> I think what possibly led the learned Judge to act as he did when he was of opinion that there was no evidence against this appellant was that he had got into his mind that the jury could not say in this particular case: 'We find a verdict of not guilty against both because we are not satisfied which was guilty, if one of them was'. With great respect to the learned Judge, that is not the law. If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. Finnemore J, remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed;

but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case.

In any event, apart from that, what stands out glaringly in this case was the right of private defence which, it is open to the Court to consider if it arises from the material on record even if the accused does not plead self-defence. (*In re Jogali Bhaigo Naiks* AIR 1927 Mad. 97).

The law pertaining to the right of private defence is explicitly set out in the Penal Code. Section 96 of the Penal Code which provides that nothing is an offence which is done in the exercise of the right of private defence, s. 97 gives a person the right to defend his own body and the body of any other person against offence affecting the human body and s. 100 provides that the right of private defence of the body extends to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be such an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault.

In *Nga Kyaw Zan* [1903] 9 Burma R. 191:

The deceased rushed at the accused, armed with a heavy weapon and showing every intention to assault him. The accused used his spear, when the deceased was in the very act of delivering a blow to him, and in doing he killed the deceased. The Sessions Judge held that the right of private defence was exceeded, because the accused had an opportunity of running away. It was held that the accused reasonably anticipated grievous hurt to himself and consequently he had a right to use his spear to defend himself against the blow even to the causing of death.

In *Mahandi* [1930] AIR (L) 93 where the assailants armed with clubs opened an attack on the accused armed with lathis (wooden staves) and a blow given by one of the accused fell on the head of one of the assailants and caused a fatal injury, it was held that the accused did not exceed the right of private defence and were not guilty of any offence.

In *Bhut Nath Dome* 10 Cr. LJ 391 the deceased S and three others who formed his party, attacked with clubs accused B and his party, three in number, as a result of a quarrel. One of the party of the deceased struck a blow on the accused which felled him to the ground. The accused rose and inflicted a blow on the head of S which fractured his skull which caused his death. It was held that the accused did not exceed his right of private defence.

In *Emperor v. Lal Bakhsh* [1945] AIR (Lahore) 43 at 45 there is this passage -

It is not denied that this judicial confession of the respondent is good evidence and he can be convicted on the strength of it. Two things are clear from that statement. One is that the respondent snatched the club from the deceased and hit him on his head with it when he found that the latter was going to attack him and the second is that the deceased made no effort to snatch back his club from the respondent or to attack him in any way after the respondent had disarmed him and had even given him the first blow. The learned Counsel for the Crown frankly admitted that if the respondent had genuine apprehension that the deceased was going to attack him and he was reasonably believed that the attack would result into grievous hurt he could go to the length of causing his adversary's death in exercise of the right private defence, even though his adversary had not actually inflicted any blow upon him. What he however argued was that in this case the respondent could have had no genuine

apprehension and he acted not in order to defend himself against a threatened attack but because he was infuriated by the conduct of the deceased. Now there being no reliable evidence his own judicial confession, I have no option but to accept it as true, and according to that statement the respondent, who was armed with a club, did intend to attack the deceased and taking into consideration the fact that the deceased was a man of desperate character who had recently come out of jail after undergoing a long sentence of imprisonment which had been awarded to him for causing somebody's death, the respondent had every reason to believe that unless he deprived him of his weapon and disabled him from doing any harm to him his life would not be safe. Accordingly I hold that the first blow given by the respondent to the deceased was in the exercise of the right of self defence.

Different, however, is the case with regard to the second blow. As has been stated above, the respondent did not even assert that after the first blow the deceased made any attempt to showed any inclination to attack him. His learned Counsel argued that there was every probability that the deceased, had he not been disabled altogether, would have tried to take back the weapon from the respondent and use it for hitting him. But this is not the position which the respondent himself took in his confessional statement. On the other hand, a perusal of the statement makes me think that he gave the second blow not because he apprehended any more danger from his victim but because he went on abusing him. The action of the respondent in giving this blow cannot, therefore, be protected by the right of private defence.

In the face of my finding of fact that the deceased and his party of five men armed with wooden clubs and bottles had set upon the four accused persons I had no difficulty in concluding that the accused persons were justified in defending themselves with similar weapons and that although the unfortunate deceased suffered injuries that caused his death none of the accused persons had exceeded the right of private defence.

In considering the evidence adduced by the prosecution which I assumed was the best evidence available it seemed obvious that the acquittal of each of the accused persons at the close of the prosecution's case was inevitable and a foregone conclusion.

In the event I held that the prosecution had failed to prove a *prima facie* case against any of the accused persons in respect of the charge or in respect of any other offence and accordingly and as required by s. 214(1) of the Code I directed the Jury to return a verdict of not guilty in respect of each of the accused persons.

Also found at [1982] CLJ 118